GUANNEX LEASING SDN. BHD.

v.

JOON HO VIDEO SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C168 OF 1985)
27 MARCH 1992

CIVIL PROCEDURE: *Application to strike out plaintiff's claim - O. 18 r. 19(1)(b), (c) and (d) Rules of the High Court 1980 - Equipment Lease Agreement executed by 1st defendant - Guarantee and indemnity agreement executed by 2nd, 3rd and 4th defendants - Continuing guarantee - Whether there was good consideration - Whether past consideration - 1st defendant repudiated lease agreement - Plaintiff claim for damages.*

This was an appeal by the plaintiff against the decision of the SAR of the High Court, Kuala Lumpur who on 13 December 1990 ordered that the 4th defendant's application to strike out the plaintiff's writ of summons and statement of claim pursuant to O. 18 r. 19(1)(b), (c) and (d) of the RHC 1980 be allowed with costs. Hence, this appeal by the plaintiff to the Judge in chambers.

On 17 June 1983, the plaintiff and the 1st defendant entered into an Equipment Lease Agreement. By an Agreement dated 23 June 1983, the 2nd, 3rd and the 4th defendants Guaranteed payment by the 1st defendant of all the sums due under the said Lease Agreement as well as the due observance and performance by the 1st defendant of the terms and conditions contained therein. The Lease Agreement was signed by the 4th defendant on behalf of the Lessee.

Issue: Whether there was past consideration in this case.

Held:
As this was not a case where the plaintiff's case was obviously unsustainable, the appeal was allowed with costs.

[Appeal allowed with costs.]

Cases referred to:
Golden City Dvpt. Sdn. Bhd. & Anor. v. Garhoe & Anor. [1983] 1 MLJ 86 ***(foll)***
Loh Holdings Sdn. Bhd. v. Peglin Dvpt. Sdn. Bhd. & Anor. [1984] 1 CLJ (Rep) 211 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(b),(c), (d)

For the plaintiff - S. Davindran; M/s. Yusuf Lee Pathma & Marbeck
For the defendant - Christie Soosay; M/s. Christie Soosay Nathan & Associates

JUDGMENT

Zakaria Yatim J:

This was an appeal by the plaintiff against the decision of the Senior Assistant Registrar given on 13 December 1990 ordering that the fourth defendant's application to strike out the plaintiff's writ of summons and statement of claim pursuant to O. 18 rule 19(1)(b), (c) and (d) of the Rules of the High Court 1980 be allowed with costs.

After hearing the arguments of Counsel for both parties in chambers and after considering the evidence, I allowed the appeal with costs. At the request of Counsel for the fourth defendant, I adjourned the matter into open Court for further argument.

The plaintiff was at the material time a private limited company incorporated in Malaysia having its principal office at No. 290, Jalan Raja Laut, Kuala Lumpur.

In para. 6 of the statement of claim the plaintiff averred that by an equipment Lease Agreement in writing dated 17 June 1983 the plaintiff agreed to Lease and let out to the first defendant, a private limited company incorporated in Malaysia having its principal office at No. 12A, Jalan Pasar, Old Klang Road, Kuala Lumpur, the following equipments:

14 sets	National Video Cassette Recorder Model NV - 7200EN. S/N H2KD-02722, H2KD-0755, H2FA-03984, H2FA-03815, H2FA-02979, H2FA-03846, H2FA-03825, H2FA-05777, H2KA-02005, H2KD-02028, H2FA-05492.
7 sets	Sony Video Cassette Recorder Model C-6 S/N 809687, 807680, 810063, 808524, 0810854, 0810864, 807672.
1 set	Technics Equaliser Model SH-8045
5 sets	National Video Cassette Recorder Model 300EN S/N A3KE-00316, A3KG-02193 A3KH-03934, A3KH-04248, - A3KH-03956.
2 sets	Mitsubishi Room Air-Cond. Model NW22EB S/N 701605, 701583.
10 sets	Hitachi Video Cassette Recorder Model 9300 S/N 20919585, 20928197, 20927667, 20928186, 20817180, 20817183, 20817490, 20817914.
4 sets	Toshiba Video Cassette Recorder Model V8600E S/N 71038751, 41018668, 71038743, 98018494.
1 set	ITT Colour Television Model 320M S/N 12/5/3SE/L.

The terms and conditions of the said Lease Agreement were:

(i) that the first defendant was to punctually pay to the plaintiff a monthly rental of RM3,178;

(ii) that the first defendant must not remove the said equipments from the first defendant's premises without the plaintiff's prior written consent;

(iii) that the first defendant should not attempt to transfer, sell or otherwise dispose of the said equipments or do any other act that might infringe upon the plaintiff's ownership;

(iv) that in the event the first defendant defaulted in the payment of rent, the plaintiff had the right to take possession of the said equipments and/or to terminate the said Agreement and to demand the full amount of the agreed loss value in addition to compensation for all loss and damages including but limited to loss of profits.

In para. 8 of the statement of claim, the plaintiff averred that in consideration of the plaintiff agreeing to enter into the said Agreement with the first defendant and by an Agreement dated 23 June 1983, the second, third and fourth defendants Guaranteed payment by the first defendant of all the sums due under the Lease Agreement as well as the due observance and performance by the first defendant of the terms and conditions contained therein.

In para. 9 of the statement of claim the plaintiff averred that the first defendant fell into arrears of the rental from November 1983 to August 1984 and had not paid any rentals since.

In para. 10, the plaintiff averred that the first defendant who was in breach of the Lease Agreement, had repudiated the said Agreement.

In para. 10, the plaintiff averred that by a letter dated 6 October 1984, the plaintiff, through its solicitors accepted the first defendant's repudiation and terminated the Lease Agreement with immediate effect.

The plaintiff's claim against the first defendant was for the sum of RM110,800.73 being damages suffered by the plaintiff as a result of the first defendant's repudiation of the Lease Agreement.

By a letter dated 6 October 1984 the plaintiff, through its solicitors called upon the second, third and fourth defendants to make payment of the said sum. Despite repeated demands, the defendants did not pay the said sum to the plaintiff.

Mr. S. Sevandran, Counsel for the plaintiff informed the Court that the Senior Assistant Registrar struck out the writ and statement of claim on the issue of past consideration. The arguments of both parties at the hearing of the appeal were only on the issue whether there was past consideration in this case.

Mr. C. Soosay Nathan, Counsel for the fourth defendant referred to para. 3 of the fourth defendant's affidavit affirmed on 29 August 1990 (encl. 45) in which the fourth defendant averred that the equipment Lease Agreement was dated 17 June 1983 whereas the Guarantee and Indemnity Agreement was dated 23 June 1983.

The plaintiff, in its affidavit in reply (encl. 47) averred that there was good consideration because the guarantee executed was a continuing guarantee.

I have examined the Lease Agreement and I found that it was executed on 17 June 1983. The Guarantee and Indemnity Agreement was signed on 23 June 1983. The Guarantee and Indemnity Agreement *inter alia* states:

1. **In consideration of your entering at our request into the foregoing Lease Agreement** (hereinafter called 'the Lease Agreement') with Joon Ho Video Sdn. Bhd. of 12A, Jalan Pasar, 5th mile Old Klang Road, Overseas Union Garden, Kuala Lumpur.

   (hereinafter called 'the Leese' which expression shall include its successors-in-title and permitted assigns) we the undersigned hereby jointly and severally Guarantee on demand by you the punctual payment by the Leese of all rentals, interest, the agreed loss value referred to in items (9) and (10) of the Schedule of the Lease Agreement and all other sums whatsoever due under the Lease Agreement and the due performance of all the Leese's obligation thereunder and we further jointly and severally undertake to Indemnify you against all losses expenses (including legal costs on a full indemnity basis) charges and damage incurred or suffered by you in consequence of any failure by the Leese to perform any of the Leese's obligations under the Lease Agreement.

2. We further jointly and severally agree that our liability under this Guarantee and Indemnity shall be as principal debtors and not merely as sureties and **shall be a continuing guarantee** and shall be irrevocable and our liability shall not be in any way discharged diminished or affected by the granting ... or indulgence to the Leese or by the effecting of any compromise with the Leese or any ... to sue the Leese or any variations of the Lease Agreement or any change in the constitution of the Leese and our liability hereunder shall subsist whether or not you have a legal right and whether or not you have availed yourself of your legal remedies against the Leese and our liability shall also extend to over and

renewal or renewals of the Lease Agreement and that this Guarantee and Indemnity shall not be affected or prejudiced by any other guarantees and/or indemnities and any other forms of security now ... held by the Lessor.
(Emphasis added)

It is significant to note that the Lease Agreement was entered into between the plaintiff and the first defendant at the request of the fourth defendant and the other guarantors. Furthermore in para. 2 of the guarantee and indemnity Agreement above provides that the guarantee was a continuing guarantee.

With regard to the Lease Agreement, although it was executed on 17 June 1983, the Lease did not commence on the date the Agreement was executed.

Under the Lease Agreement, the Lease was to commence on the date when the acceptance receipt was issued by the first defendant. It is not known when the equipment was to be delivered to the premises of the first defendant because item (4) of the Schedule to the Lease Agreement did not specify any date.

Article 2 of the Lease Agreement states:

Subject to the provisions for earlier termination as elsewhere provided in this Lease Agreement the initial term (hereinafter called 'the Initial Term') of the Lease hereby created shall be the period described in item (5) of the Schedule which term shall commence on the date when the Acceptance Receipt referred to in Article 5 hereof is issued.

On the question of acceptance receipt Article 5 of the Lease Agreement provides:

Article 5. Delivery of Equipment.

(1) The Leese shall inspect the Equipment and issue to the Lessor an Acceptance Receipt (hereinafter called 'the Acceptance Receipt') therefor in such form as may be required by the Lessor not later than the date stipulated in item (4) of the Schedule and after receipt of the Equipment either from the seller named in item (2) of the Schedule (hereinafter called 'the Seller') or from the Lessor as the case may be.

(2) The Leese may commence using the Equipment in accordance with the provisions of this Lease Agreement from the date the Leese issued to the Lessor the Acceptance Receipt pursuant to the provisions of the proceeding paragraph.

(3) (a) In the event that the Leese discovers any defects in the Equipment or has any complaints in respect thereof the Leese shall immediately notify the Lessor thereof and specifically state such defects and complaints in the Acceptance Receipt provided that nothing in this clause shall be construed to imply that the Lessor is liable or responsible for such defects and complaints.

(b) In the event of the Leese failing to notify the Lessor in accordance with paragraph 3(a) of this article the Leese hereby agrees that it shall be deemed that the Equipment has been delivered in perfect condition and that the Leese shall not raise any objections whatsoever thereafter.

(4) If pursuant to this to Lease Agreement it shall be necessary to do so, the Lessor shall exercise its best effort to make arrangements with the Seller so that the Equipment can be delivered to the Leese by the expected date of delivery as described in item (4) of the Schedule. In the event that the Lessor is unable to make such arrangements for delivery with the Seller the Lessor shall notify the Leese to that effect and discuss with the Leese the possibility of making substitute arrangements. If the Lessor and the Leese are unable to agree on such substitute arrangements within fourteen (14) days after such aforesaid notice by the Lessor either the Lessor or the Leese shall be entitled to terminate this

> Lease Agreement and upon such termination this Lease Agreement shall be null and void and of no effect and neither the Lessor nor the Leese shall be held responsible for such termination and neither the Lessor nor the Leese shall have any claims against the other.

It is significant to note that the above Lease Agreement was signed by the fourth defendant on behalf of the Leese.

In view of what I have stated above I am doubtful whether this was a case of past consideration.

In my opinion this was not a case where the plaintiff's case was obviously unsustainable. In *Golden City Dvpt. Sdn. Bhd. & Anor. v. Garhoe & Anor*. [1983] 1 MLJ 86 the Federal Court held:

> Therefore the summary procedure under O. 18 r. 19 can only be adopted where it is clearly seen that a claim or answer is on the face of it obviously unsustainable. In this case the claim did not appear to be obviously unsustainable and therefore the application was rightly dismissed.

In *Loh Holdings Sdn. Bhd. lwn. Peglin Dvpt. Sdn. Bhd. & Anor*. [1984] 1 CLJ (Rep) 211, the Federal Court again held:

> ... Under O. 18 r. 19 of the Rules of the High Court, pleadings will only be struck out in plain and obvious cases. So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out.

For the reasons stated above, I confirmed the decision I made in Chambers.

Also found at [1992] 3 CLJ 1716